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ជាតិ សាសនា ព្រះមហាក្សត្រ

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះតុលាការកំពូល

Supreme Court Chamber
Chambre de la Cour suprême

ឯកសារដើម
ORIGINAL/ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ (Date): 28-Jun-2013, 14:39
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សំណុំរឿងលេខ: ០០២/១៩-០៩-២០០៧-អ.វ.ត.ក-អ.ជ.ស.ដ/អ.ជ.ត.ក(២៥)
Case File/Dossier N°. 002/19-09-2007-ECCC-TC/SC(25)

Before: Judge KONG Srim, President
Judge Chandra Nihal JAYASINGHE
Judge Agnieszka KLONOWIECKA-MILART
Judge MONG Monichariya
Judge Florence Ndepele Mwachande MUMBA
Judge SOM Sereyvuth
Judge YA Narin

Date: 28 June 2013
Language(s): Khmer/English/French
Classification: PUBLIC

DECISION ON KHIEU SAMPHÂN’S APPEAL AGAINST DECISION TO HEAR EXPERT WITNESSES BEFORE ISSUANCE OF NEW SEVERANCE DECISION

Co-Prosecutors
CHEA Leang
Andrew CAYLEY

Accused
KHIEU Samphân

Civil Party Lead Co-Lawyers
PICH Ang
Elisabeth SIMONNEAU-FORT

Co-Lawyers for KHIEU Samphân
KONG Sam Onn
Anta GUISSÉ
Arthur VERCKEN
Jacques VERGÈS

1. **THE SUPREME COURT CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea between 17 April 1975 and 6 January 1979 (“Supreme Court Chamber” and “ECCC”, respectively) is seized of an appeal filed on 29 March 2013 by the Defence for KHIEU Samphân (“Defence”) against a decision to hear expert witnesses Phillip SHORT and Elizabeth BECKER prior to the issuance of a decision on the severance of Case 002 (“Appeal” and “Impugned Decision”, respectively).¹ No response to the Appeal was filed.

2. On 8 February 2013, the Supreme Court Chamber issued its “Decision on the Co-Prosecutors’ Immediate Appeal of the Trial Chamber’s Decision Concerning the Scope of Case 002/01”² (“SCC Decision”), declaring that the cumulative effect of a number of errors committed by the Trial Chamber regarding the severance of Case 002 occasioned the invalidity thereof.³ The Supreme Court Chamber specified that the SCC Decision is without prejudice to the Trial Chamber’s reassessment of severing Case 002, but that “it must first invite the parties’ submissions on the terms thereof, and only after *all* parties’ respective interests are balanced against *all* relevant factors may a severance of Case 002 be soundly undertaken”.⁴ The Trial Chamber thereafter immediately issued a memorandum scheduling a hearing to take place on 14 and 15 February 2013, and listing nine detailed and specific issues related to the severance of Case 002 for the parties to address.⁵ The hearing was subsequently rescheduled to 18 and 20 February 2013.⁶

3. Following the submissions heard on 18 February 2013, the Trial Chamber issued another memorandum on 19 February 2013 requesting supplementary information,⁷ which the parties provided during a hearing on 21 February 2013.⁸ The Trial Chamber invited the parties to comment upon, among other things, its consideration that, if the testimonies of expert witnesses

¹ *Appel immédiat de la Défense de M. KHIEU Samphân interjeté contre la décision rendue par voie de courriel de Mme LAMB le 21 février 2013*, E264/1/2/1, 29 March 2013, referring to Electronic mail by Susan LAMB, Senior Legal Officer of the Trial Chamber, entitled “Directions to the parties following hearing on severance”, sent on 21 February 2013 at 3:14PM. See Appeal, Annex 2: E-mail of Susan LAMB, E264/1/2/1.3, 29 March 2013 (“Annex 2”).

² E163/5/1/13.

³ SCC Decision, para. 49.

⁴ SCC Decision, para. 50 (emphasis in original).

⁵ Memorandum by Judge NIL Nonn, President of the Trial Chamber, entitled “Directions to the parties in consequence of the Supreme Court Chamber’s Decision on Co-Prosecutors’ Immediate Appeal of the Trial Chamber’s Decision concerning the Scope of Case 002/01 (E163/5/1/13)”, E163/5/1/13/1, dated 12 February 2013 and filed on 14 February 2013.

⁶ T. (EN), 18 February 2013, E1/171.1, pp. 6, 114. See also T. (EN), 20 February 2013, E1/172.1.

⁷ Memorandum by Judge NIL Nonn, President of the Trial Chamber, entitled “Supplementary questions to the parties following hearing of 18 February 2013 in consequence of the Supreme Court Chamber’s Decision on Co-Prosecutors’ Immediate Appeal of the Trial Chamber’s Decision concerning the Scope of Case 002/01 (E163/5/1/13)”, E264, 19 February 2013 (“Supplementary Memorandum”).

⁸ T. (EN), 21 February 2013, E1/173.1.

Philip SHORT and Elizabeth BECKER are not heard before the issuance of a new decision on the severance of Case 002, “it is likely that the Chamber will lose the ability to hear them at all”.⁹ The Trial Chamber accordingly sought the parties’ views on whether the testimonies of Philip SHORT and Elizabeth BECKER, as well as four other witnesses scheduled to be heard “imminently”, should be postponed until after the issuance of a written severance decision, or “could they testify at least in relation to the scope of trial as understood by all parties prior to the annulment of the Severance Order and all related decisions?”¹⁰

4. On 21 February 2013, the Co-Prosecutors and the Civil Party Lead Co-Lawyers argued that there was no legitimate reason not to hear Philip SHORT’s and Elizabeth BECKER’s testimonies as planned.¹¹ All defence teams, however, took the position that no witnesses whatsoever should be heard until after the issuance of a new decision on the severance of Case 002.¹² Three hours after the conclusion of the hearing, the Senior Legal Officer of the Trial Chamber informed the parties by electronic mail of the following:

The [Trial] Chamber shall proceed to hear experts Philip SHORT on the week commencing Monday 4 March 2013 and Eli[z]abeth BECKER during the week commencing 11 March 2013, as previously scheduled. Consistent with the [Trial] Chamber’s previous directions, both experts may be questioned on the entirety of Case 002 on areas within the knowledge of the experts, and the parties are encouraged to focus their questions on areas relevant to the facts at issue in Case 002/01. The Trial Chamber will not otherwise hear the testimony of other individuals whose testimony had been imminent prior to the SCC Decision.¹³

5. On 26 February 2013, the Defence indicated its intention to appeal the Impugned Decision by submitting a courtesy copy of the Appeal by electronic mail in advance of filing.¹⁴ A few hours later, the Trial Chamber issued a memorandum reiterating that Philip SHORT’s and Elizabeth BECKER’s testimonies would be heard “as previously scheduled”, and specifying that,

⁹ Supplementary Memorandum, para. 3(iii).

¹⁰ Supplementary Memorandum, para. 3(iv).

¹¹ T. (EN), 21 February 2013, E1/173.1, pp. 20-21 (Co-Prosecutors), 56 (Civil Party Lead Co-Lawyers).

¹² T. (EN), 21 February 2013, E1/173.1, pp. 36-37 (NUON Chea), 42-44 (IENG Sary), 52-53 (KHIEU Samphân). See also T. (EN), 20 February 2013, E1/172.1, pp. 19-21 (NUON Chea), 53 (IENG Sary).

¹³ The court adjourned at 12:04PM. See T. (EN), 21 February 2013, E1/173.1, p. 68. The e-mail was sent at 3:14PM. See Appeal Annex 2.

¹⁴ Electronic mail by Marie CAPOTORTO, Legal Consultant for the Defence, entitled “Re: Directions to the parties following hearing on severance”, sent on 26 February 2013 at 10:00AM. See *Appel immédiat de la Défense de M. KHIEU Samphân interjeté contre la décision rendue par voie de courriel de Mme LAMB le 21 février 2013 – Mémoire complémentaire*, E264/1/2/1/1, 29 March 2013 (“Supplementary Brief”), Annex 3: Email of Marie CAPOTORTO to Sheila PAYLAN and Matteo CRIPPA, dated 26 February 2013, E264/1/2/1/1.4, 29 March 2013 (“Supplementary Annex 3”).

because they could be questioned on all topics within Case 002, hearing these witnesses prior to the issuance of a new severance decision would cause no prejudice.¹⁵

6. On 28 February 2013, the Defence requested authorization pursuant to Article 7.2 of the Practice Direction on Filing Documents¹⁶ to file the Appeal in French in the first instance, with a Khmer translation thereof to follow at the first opportunity, on the basis that the Interpretation and Translation Unit of the ECCC (“ITU”) indicated a Khmer translation could not be available before 11 March 2013, and that in the Appeal, the Defence would request that the Supreme Court Chamber render its decision before 4 March 2013.¹⁷ On the same day, authorization was denied on the basis that the exceptional circumstances required by Article 7.2 of the Practice Direction on Filing Documents had not been shown, because there remained ample time to file the Appeal in both French and Khmer,¹⁸ and because the circumstances did not permit or require the Supreme Court Chamber to render its decision before 4 March 2013.¹⁹ The Defence was accordingly advised to file its Appeal within the time limits and linguistic requirements prescribed by the Internal Rules and Practice Direction, and assured that any possible prejudice arising from any possible appealable error by the Trial Chamber would be remedied *ex post facto*.²⁰

7. On 4 March 2013, the Trial Chamber was unable to proceed with the examination of Philip SHORT by reason of IENG Sary’s re-hospitalization and incapacity at that time to waive his right to be present, as well as the fact that the national staff members of the ITU went on strike.²¹ The Trial Chamber therefore postponed the hearing of Philip SHORT’s and Elizabeth BECKER’s testimonies, with “information regarding their rescheduling [to] follow in due course.”²² At the time of the filing of the Appeal on 29 March 2013, these witnesses had still not been heard.

¹⁵ Memorandum by Judge NIL Nonn, President of the Trial Chamber, entitled “Scheduling of Experts Philip Short and Elizabeth Becker and postponement of Fact Witnesses until Decision on Severance”, E264/1, 26 February 2013 (“Scheduling Memorandum”), para. 2.

¹⁶ Practice Direction on the Filing of Documents before the ECCC, Revision 8, 7 March 2012 (“Practice Direction on Filing Documents”).

¹⁷ Electronic mail by Marie CAPOTORTO, Legal Consultant for the Defence, entitled “*Demande d’autorisation de déposer en français dans un premier temps*”, sent on 28 February 2013 at 6:13AM. See Supplementary Brief, Annex 2: Email of Sheila PAYLAN to Marie CAPOTORTO, dated 28 February 2013, E264/1/2/1/1.3, 29 March 2013 (“Supplementary Annex 2”).

¹⁸ Rule 107(1) of the Internal Rules affords 30 days for the filing of an immediate appeal from a Trial Chamber decision.

¹⁹ See Supplementary Annex 2.

²⁰ See Supplementary Annex 2.

²¹ T. (EN), 4 March 2013, E1/174.1, pp. 4-5; Memorandum from Judge NIL Nonn, President of the Trial Chamber, entitled “Postponement of Expert Testimony”, E264/3, 6 March 2013 (“Postponement Memorandum”), para. 1.

²² Postponement Memorandum, para. 1.

8. The Defence submits that the Senior Legal Officer's e-mail of 21 February 2013 constitutes a decision,²³ and that the Appeal is admissible under Rules 21 and 104(4)(d) of the Internal Rules.²⁴ The Defence further submits that the Trial Chamber erred in law and in the exercise of its discretion resulting in prejudice by refusing to suspend all substantive hearings until the issuance of a new severance decision.²⁵ In particular, the Defence contends that it is impossible to prepare a defence or a line of questioning, or to advise KHIEU Samphân on case strategy, in the absence of certainty regarding a new severance of Case 002 and the terms thereof.²⁶

9. In addition, the Defence argues that the *de facto* stay of proceedings occasioned by the fact that Philip SHORT and Elizabeth BECKER had not yet been heard at the time of the filing of the Appeal does not render the Appeal moot, because so long as the possibility remains of hearing these witnesses before the issuance of a new severance decision, the prejudice it suffers remains real and the prospect of a fair trial remains undermined.²⁷ The Defence accordingly requests the Supreme Court Chamber to "rule immediately or suspend the substantive hearings pending issuance of its decision", declare the Appeal admissible, and annul the Impugned Decision.²⁸

10. The Defence essentially argues that it would suffer irreparable prejudice if compelled to examine Philip SHORT and Elizabeth BECKER before the issuance of a new severance decision, and accordingly requests that the Supreme Court Chamber prevent such an occurrence. However, the Supreme Court Chamber notes that, since the filing of the Appeal and Supplementary Brief, circumstances further evolved such that the Defence's feared occurrence never in fact materialized. In particular, the Trial Chamber issued its new severance decision on 26 April 2013,²⁹ at which time Philip SHORT and Elizabeth BECKER had still not been heard. Philip SHORT was subsequently heard 10 days later, from 6 to 9 May 2013.³⁰ Elizabeth BECKER has yet to be heard. As such, the Defence has effectively gained the relief which it sought from the Supreme Court Chamber. The Appeal is therefore moot and should be dismissed as such, without determining its admissibility or merits.

²³ Appeal, paras. 5-8.

²⁴ Appeal, paras. 9-26.

²⁵ Appeal, paras. 27-53.

²⁶ Appeal, paras. 32, 36-52.

²⁷ Supplementary Brief, paras. 8-9, 15-25.

²⁸ Appeal, para. 54. *See also* Appeal, paras. 5, 26, 35, 53; Supplementary Brief, paras. 9, 26, 28.

²⁹ Decision on Severance of Case 002 following Supreme Court Chamber Decision of 8 February 2013, E284, 26 April 2013.

³⁰ *See* T. (EN), 6 May 2013, E1/189.1, T. (EN), 7 May 2013, E1/190.1, T. (EN), 8 May 2013, E1/191.1, and T. (EN), 9 May 2013, E1/192.1.

11. For the foregoing reasons, the Supreme Court Chamber **DISMISSES** the Appeal as moot.

Phnom Penh, 28 June 2013

President of the Supreme Court Chamber



KONG Srim